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MEMORANDUM

TO: **President–Elect Obama Transition Team**
Rahm Emanuel
David J. Hayes
Robert M. Sussman

FROM: John C. Hall

DATE: November 30, 2008

RE: Need for White House Intergovernmental Coordinator/Advisor for Critical Energy Project and Global Warming Reduction Initiatives --
Offer of Services

Synopsis: This memorandum addresses key institutional problems that the new Administration will encounter and must resolve to implement its energy and environmental policies. It proposes a means to resolve those issues via White House oversight and initiative.

Statement of The Problem

Two central and interrelated domestic goals of the Obama Administration are the improvement of the nation's economic condition and the "repowering" of America to reduce foreign oil dependence and greenhouse gas emissions. Closely aligned with this strategy is the retooling of American automakers to construct high mileage electric cars. Of course, electric cars with low/no emissions will increase demands on electric utilities and, in the short run, this demand will likely be met by expanding conventional power generating plants. To achieve long term energy independence and reduce greenhouse gas

emissions, a series of renewable energy sources are being considered, with wind and solar power chief among the promising alternatives. Other alternatives such as clean coal technology, biofuels, increased drilling for domestic oil and natural gas sources (now viable due to high crude costs), hydropower and nuclear energy are also considered part of the available alternatives needed to ease the stranglehold spiraling imported oil costs have placed on the domestic economy. The Obama Administration's strategy is clearly necessary for America's long term economic growth, national security and protection of the global environment. This is an unprecedented coincidence of often-conflicting interests.

Each of these energy independence/global warming reduction alternatives must be sited, permitted and constructed. Each has environmental/economic benefits and detriments, with supporters as well as detractors.[1] Attainment of the Obama Administration's *long term* programmatic objectives will necessarily involve a series of compromises and collaborative efforts.[2] Federal, state and local governments will need to work together to promote new approaches to sustainable energy and greenhouse gas reduction. Regional differences and individual/private group interests will need to yield to a plan designed to achieve the nation's overall long term environmental/energy goals. Unfortunately, the existing design of most environmental statutes will impede attainment of these objectives. Each statute has its own narrow purview and does not consider any consequences beyond the four corners of its construct; in fact, many are ill-suited to address the issues and tradeoffs that will be required to authorize necessary initiatives. Unless significant revisions are made to key environmental statutes, the Administration's program to restore the economy and protect the global environment may be frustrated.[3]

For example, the use of carbon capture and sequestration technology to reduce emissions from coal-fired plants requires that a series complex of Clean Water Act and Safe Drinking Water Act geotechnical issues be resolved. New energy projects will undoubtedly impact endangered species habitat and individuals. The Endangered Species Act is particularly narrow in its focus and rigid in its procedural requirements; it was designed to prevent local impacts, not avoid global threats. Similarly, most regulatory programs are not designed to allow decades long impacts or tradeoffs to achieve long term goals. In particular, antidegradation and antibacksliding requirements under the air and water programs, while admirable in their intent, will cause numerous problems in

[1] Both biofuel/ethanol projects cause problems with significant water usage, nutrient pollution and disposal of highly saline wastes. Coal generates greenhouse gases and mercury emissions, nuclear has a disposal "issue" and hydropower causes fishery and habitat losses. The development of wind power facilities will, to a certainty, injure or kill millions of birds, including some endangered species. As a result, attempts to construct any of these alternatives have generated both local and regional opposition. It is not apparent that environmental organizations will accept any alternatives that involve the expanded use of fossil fuel or nuclear facilities.

[2] Addressing the energy/environment problems will take, at a minimum, 40 years of concerted efforts. The political and economic commitment to such long term efforts must be "chiseled into the political landscape" over the next decade to ensure sufficient ongoing resources are committed to resolving these interrelated problems.

[3] Supreme Court precedent that governs most agency decision making (e.g., *State Farm*) does not permit agencies to consider factors outside those specifically established by Congress in the various statutes.

implementation and present a significant impediment to promoting the global solutions needed to address the current crisis.

A lessening of environmental protection is not needed to achieve the Obama Administration's goals; rather, the existing rules framework and federal programs must be refocused to promote long term solutions that will achieve greater environmental benefits at a much lower energy usage. Statutory waivers or variances will be required where the letter of the law does not provide sufficient flexibility or to promote compromises between program offices and collaborative efforts with state stakeholders.[4] However, it is not in the nature of federal agencies (and may not be within their power) to authorize innovative project approval or exercise statutory flexibility.[5] ***Consequently, a White House position that helps to identify statutory roadblocks, overcome agency inertia and promote statutory flexibility to ensure implementation of the long term best environmental solution is essential if the Administration's program is to succeed.***[6]

Other Regulatory Program Roadblocks and Unintended Consequences

There are other concerns that the basic Obama Administration economic recovery and energy/environment policy papers have yet to address and necessarily must reconcile. Many papers address strategies to reduce existing energy usage and future greenhouse gas emissions, but these documents fail to fully grasp the extent of increased energy usage and costs required to meet current environmental mandates. At this time, there are a host of environmental requirements poised to impose high costs on communities and industries throughout the country. Many of these pending requirements are poorly related to demonstrable environmental needs and lack consideration of whether overall environmental benefits will be achieved (e.g., updated BAT requirements). These requirements, if imposed, will cause significant adverse economic effects and lead to *increased* energy consumption and greenhouse gas emissions well out of proportion to

[4] A reality of all environmental statutes is that as they age, the focus of the existing programs typically becomes much smaller environmental threats (global warming being the exception to the rule). These residual threats involve more complex science (e.g., endocrine disruptors) and abatement often requires much greater energy usage and costs. Due to statutory framework and resource limitations global, regional and cross program threats (e.g., Gulf of Mexico hypoxia, global warming, shrinking water resources) are put aside to address simpler problems that provide the illusion of regulatory progress. There are reasons this occurs. The more significant regional problems also demand that agencies act in concert to achieve the proper solution. Unfortunately, interagency cooperation is not a common occurrence and budget constraints force each agency to protect its own interests.

[5] A good example of EPA's recent attempts to focus program resources and avoid permitting minor sources is the recently published Water Transfer Rule. While broadly hailed as an appropriate action by many state and local officials, EPA was sued by nine states and several environmental groups who claimed each transfer must have an NPDES permit. Judicial intervention will likely result in the need to issue over 50 thousand new permits and many of these will be litigated.

[6] There is precedent for this type of position. In the late 1970s Congress mandated a highly successful special review under the Clean Water Act Construction Grants Program – the Advanced Treatment Review. Due to the overarching responsibility of that review, dozens of changes were instituted to improve the effectiveness of the CWA regulatory program. Once the federal grant program lapsed, impetus for such regulatory introspection evaporated.

any possible environmental gain.[7] These issues arise primarily under the Clean Water Act, Clean Air Act, and Safe Drinking Water Act. Each of these Acts *independently* imposes new and sometimes inconsistent requirements that, as a matter of law, must be met by municipal/industrial entities, unless some high cost threshold (affordability) is crossed.

EPA's "affordability" thresholds largely ignore the cumulative effects of individual requirements and allow a crushing debt to be incurred by communities (at least 2% of median income per program). This increased debt will reduce the ability of communities to absorb costs associated with critical energy/global warming initiatives. Key examples of high cost/low benefit statutory requirements include antidegradation mandates, imposing parts per billion nutrient limitations on point sources that are a very small fraction of the pollutant loadings, regulating minute quantities of pollutants resulting from regional/worldwide air deposition (e.g., mercury, PCB), directives to eliminate bacteria in stormwaters (an impossibility), disinfection byproducts regulation under the SDWA, and agency decisions to regulate *how* pollutants are addressed rather than the *amount* of pollutants discharged.[8] *The Clean Water Act nutrient reduction objectives alone conservatively represent a $500-700 billion expenditure for local governments under ONE environmental statute for ONE pollutant*.[9] The available information with respect to this pollutant shows that far more cost-effective and less energy intensive alternatives could address the vast majority of nutrient related environmental concerns, *if the Agriculture Department and EPA were directed to ensure implementation of the most cost-effective alternatives*. However, because existing regulatory programs are not designed to address area wide or agricultural sources, efforts are focused on reducing nutrients from less significant sources using far more energy intensive technologies.

To be certain, tremendous environmental progress was achieved in our country from the mid-1970s through 1990s; most of the gains resulted from the technology-forcing approaches required by environmental statutes. The low hanging fruit is now gone and simply forcing the next round of technological improvements because the technology exists will likely cause more harm than good. The remaining issues facing the country have become far more complex and more often than not are regional/global in nature, at times pitting state against state and region against region. *NONE of the environmental statutes on the books were designed to address these kinds of problems*. They are equally

[7] For example, Ottumwa, Iowa (pop. 14,000) is facing a $160 million expenditure to address combined sewer issues even though there is virtually no contact recreation use affected by these discharges. This federal requirement will cause local expenditures for other necessary infrastructure projects to cease. Phillipsburg, Montana (Pop. 900) faces a projected $6 million expenditure to implement state-of-the-art nutrient reduction facilities. There are thousands of communities facing similar situations throughout the country.

[8] EPA's pending "Blending Policy' is projected by EPA to have a nationwide impact in excess of $150 billion and does not materially improve effluent quality. It regulates "how" municipal treatment occurs under storm events, not the quality of the discharge.

[9] NRDC has filed a petition for rulemaking requesting that EPA impose the most restrictive nutrient reduction requirements for all facilities in the country. EPA is seriously considering agreeing with the NRDC petition. Granting that request will easily require more than *one trillion* dollars in new capital costs and will result in a major increase in electric usage throughout the country. These requirements would apply even to waters that do not have a nutrient impairment.

ill suited to promote wide scale implementation of clean energy technologies needed to remedy the problems because the statutory focus is local.[10]

A key example of statutory inadequacy and counterproductive regulatory program requirements is illustrated by EPA's attempts to address mercury contamination in fish -- a problem encountered in waters throughout the country, and impossible to remedy using existing laws. By regulating how mercury was used in household products, wastewater discharges were dramatically improved. Now the remaining mercury issue is an air deposition problem (99% of watershed loadings) from burning fossil fuels (primarily coal). While the United States debated (then litigated) placing mercury emission reductions between 70 and 90 percent on domestic power plants, China (the largest exporter of airborne mercury due to increased manufacturing moved to that country from the US) is constructing hundreds of new coal power facilities -- with virtually no meaningful mercury reduction equipment. *So, all of our expenditures to reduce mercury will have achieved nothing but increased power costs, increased energy consumption and reduced usage of a viable energy source (clean coal).* The far better and more effective solution would be utilize the most cost effective mercury reduction technology on US facilities to avoid localized impacts and to pressure China to reduce the export of mercury that fouls our nation's waters and the oceans in general. Of course, our Clean Air Act is not designed to address this type of issue and provides little regulatory flexibility to craft a more common sense solution where a pollutant is classified as "hazardous" under Section 112. However, where such narrow definitions force ineffective and counterproductive results, there must be a means to ensure that the right solution, weighing all of the benefits and detriments, may be implemented.[11]

Over the past 8 years the rancor over environmental regulation has increased dramatically. Virtually every environmental decision now turns into a legal battle. Some of this was deserved (e.g., the Bush Administration position on global warming); some was not (e.g., the challenge to EPA's mercury rules). However, given the general perception that the federal government was failing to address certain environmental concerns in a timely manner, environmental organizations increasingly turned to the courts for assistance and won. Environmental groups will not be inclined to compromise leverage gained by obtaining judicial review of perceived inadequacies in federal program implementation. We can fully expect the dance of the irrelevant, counterproductive regulatory scheme to continue to the detriment of all, unless a new vehicle is created to promote and execute better regulatory decisionmaking.

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[10] In fact, over the past 4 years, interest groups have sued EPA for allowing consideration of regional solutions to Clean Air Act non-compliance. Courts have ruled against EPA, finding that the Clean Air Act does not allow for such considerations. Similar decisions have been made under the Clean Water Act. *Thus, it is clear that our 1970's era environmental statutory framework actually works against regional and global solutions to current environmental problems.* To a certainty, none of the statutes ask the question "Am I doing more harm than good?" by imposing this requirement. Oddly, such a basic test has been left out of all environmental laws.

[11] In addition, states that may be receiving increased mercury loadings and environmental organizations trying to limit such sources are not inclined to accept any "innovative" solutions unless they are certain those solutions will, in fact, be implemented.

To address this rift head on the Obama Administration will need to ensure that certain key agencies are working cooperatively, which unfortunately, is not always the case.[12] Consensus needs to be reached on which aspects of existing environmental programs should be deferred, refocused or modified where the present course of action is forcing increased energy consumption, with no meaningful relationship to actual environmental needs.[13] As individual agencies' primary focus is on compliance with existing laws and basic day-to-day operations, Executive Office leadership will be needed to coordinate and direct the program changes needed to implement the new White House objectives.

Potential Solution

The amount of money and resources presently directed by various federal programs at rather minor environmental threats is staggering; without refocused/reprioritized statutes this situation will only get worse. State and local officials would vigorously support regulatory changes that would allow them to prioritize action on the most pressing local and regional environmental/energy concerns. They would also support programs that allow long-deferred infrastructure improvements to be made in a coordinated, scheduled manner. Company officials would rather invest in manufacturing improvements that reduce energy costs and increase competitiveness instead of simply increasing costs by adding on the newest treatment technology. Monies now directed at ineffective measures could be redirected under a comprehensive approach. The leaders of the mainstream environmental groups understand the seriousness of the situation; given a say in the process, they would likely support coordinated efforts that result in real environmental improvements focused on the greatest threats.

To take full advantage of the coincidence of interests that exists for the first time in two decades, the following approach is necessary:

1. Establish a White House Energy/Environmental Czar

White House level leadership will be required to attain the consensus needed to change the course of existing programs, coordinate multiple agency actions and identify the legislative actions and funding necessary to prioritize efforts to achieve long term goals. The new program administrator would guide federal and state agencies to rethink current program initiatives and find the least cost, lowest energy usage approach to achieve existing program mandates as well as new White House program objectives. This effort would require the cooperation of many who have little history of cooperation but often sit on opposite sides of a courtroom. A person with impeccable environmental credentials

[12] A professional mediator was brought in to address the rift between EPA and DOI (Fish and Wildlife Service/National Marine Fisheries Service), as these groups could not have a civil discussion with each other on endangered species issues.

[13] If coordinated properly, Obama Administration objectives on infrastructure improvement and nation service could be combined to address a number of the low cost, highly effective solutions to current adverse environmental impacts. Manpower intensive/low tech/low energy solutions such as watershed restoration will produce much greater benefits than focusing on concrete/steel/chemicals to address perceived and actual environmental needs.

(such as Sen. Al Gore), a firm understanding of regulatory complexities and the foresight to overcome regional interests will need to fill this high profile position.

2. Initiate a High Level Federal/State/Stakeholder Process to Provide Support for Obtaining Sufficient Statutory Authority to Carry Out Necessary Programs

It is likely that some form of overarching environmental statute will be needed to move the federal program at the pace that will be required -- one that allows for amendment/modification/waiver of certain specific environmental statutory requirements to achieve more pressing programmatic objectives. This would be preferable to amending individual statutes. A consensus approach to identifying key regulatory changes has the greatest likelihood of success and will help to keep all sides of the problem invested in reaching an appropriate solution. In addition, to reduce disputes over key technical issues, the stakeholder process should have access to a standing committee of leading experts that can assess issues, objections and concerns and provide the best advise on complex technical questions certain to arise.

3. Provide White House Oversight for Key Energy/Environmental Projects

White House oversight of key environmental and energy projects will be essential to allow the projects to be permitted by fostering interstate and regional stakeholder cooperation. If this does not occur, regional interests will be pitted against each other to the detriment of all. This position would ensure projects are accurately assessed for compliance with Administration objectives and that priority is given to specific long term projects needed to achieve energy independence and greenhouse gas reductions while promoting global competitiveness. The position would also be responsible for assisting the program administrator in identifying existing regulatory requirements that should be modified/deferred because of high energy usage and low environmental benefit. The challenge of this position is to bring these parties together to obtain agreement on the best possible solution, regardless of current statutory mandates.

Conclusion

Today, more than ever before, we need to focus on the right measures that produce the greatest benefits. We need to avoid misguided and costly expenditures that saddle cities, small communities and industries with unbearable and unnecessary burdens and prevent implementation of other necessary infrastructure improvements. We need to mobilize a new approach to environmental issue resolution and energy self-reliance and combine this effort with national service opportunities. This needs to be done now and done correctly. We will not get a second chance.

Given my 28 years' experience in environmental permitting and project impact assessment, comprehensive knowledge of environmental statutes, and training in environmental engineering, mathematics and law, I am uniquely capable of managing and implementing a White House level program to ensure the Administration's necessary

objectives are carried out on key projects. With a proven track record of resolving complex environmental problems on a regional and nationwide scale, as well as consensus building on technically complex problems, I have the tools and insight necessary to manage this essential effort.

Please call me if you would like to discuss this proposal further.